NO. 48354-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JEREMY LEE KEITH,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the statement of the factual and procedural history in appellant's brief, with the following caveat: Defendant refers to Makenzee[1] Pierce as "Elizabeth" three times in the final paragraph of his recitation of the factual history of the case. The stun gun was retrieved from Makenzee Pierce's purse by Lt. Staten. Verbatim Report of Proceedings at 141.

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[1] Although not reflected in the Verbatim Report of Proceedings, the State is aware that Ms. Pierce spells her name this way.

ARGUMENT

1. The evidence was sufficient to prove robbery because property is deemed to be within the presence of the victim if the victim is removed by the use of force, and the stun gun was also taken in the presence of Jacob Wise.

Defendant argues that there is insufficient evidence to support robbery because the alleged victim, Jacob Wise, was not physically present when the safe was taken. This argument overlooks two points: 1) under longstanding Washington law, if a victim is removed or prevented from approaching the place from where property is taken by force, the property is still deemed to have been taken in the presence of that victim; and 2) Defendant took an electric stun gun while in the presence of Mr. Wise.

A taking is deemed to be from a person or in his presence when the person was removed from the place of the taking by use of force or fear.

Defendant first argues that the evidence cannot establish a robbery because Jacob Wise, the victim, was locked in the bathroom when the safe was taken. However, the facts established that Mr. Wise was forced into the bathroom by Defendant's use force, and it is long-established law that,

> ...it can be a taking from a person or in his presence even though the victim was not immediately present where the victim, by

> force or fear, had been removed from or prevented from approaching the place from which the asportation of the personalty occurred.

State v. Blewitt, 37 Wn. App. 397, 398-99, 680 P.2d 457, 458 (1984) (quoting *State v. McDonald*, 74 Wash.2d 141, 443 P.2d 651 (1968).)

In *Blewitt*, the defendant and Shaef planned to rob a Budget Rent-A-Car office with two Budget employees. *Blewitt* at 397. Zeno, a shuttle bus driver, was dispatched on a false call, but returned while the crime was in progress. *Id.* at 398. Zeno was bound and placed in a bathroom while the defendant and his associates emptied the case register and took a safe using a van taking from the parking lot. *Id.* An instruction identical to Instruction 9 in this case was given, and the defendant appealed the giving of that instruction. *Id.*

Division 1 of this court affirmed, noting the *McDonald* opinion, which has remained good law for nearly fifty years. *Id.* at 398-99.

Like Zeno, Mr. Wise was removed from the place where the safe was taken by use of force (an electric stun gun,) and then was prevented from leaving the bathroom. Like in *Blewitt*, it is no defense to robbery that the robber used force to prevent the victim from actually being there

at the time of the taking. The jury were so instructed. CP at 25. This court should uphold the conviction.

Defendant's argument overlooks the electric stun gun, which was also taken.

Defendant's argument focusses on the taking of the safe. However, Defendant also took an electric stun gun while in the presence of Mr. Wise, and then used it to force him into the bathroom. This stun gun was later retrieved from Makenzee Pierce's purse, taken from her when she was arrested in nearby Elma.

The stun gun is not only the instrumentality of the force used against Mr. Wise, it is property taken while he was present.

Even assuming, *arguendo*, that the evidence is insufficient to prove the safe was taken in Mr. Wise's presence, Defendant's taking of the stun gun alone supports the charge of robbery. Therefore, his conviction should be affirmed.

2. A stipulation to uncontested facts is not ineffective assistance.

Defendant next asserts that trial counsel's candor to the court about Defendant's ability to pay legal financial obligations amounts to ineffective assistance. He argues because Defendant had previously qualified as indigent and was found indigent for purposes of appeal, he cannot pay legal financial obligations. This argument is without merit.

Standard of Review for ineffective assistance.

The standard for ineffective assistance of counsel is articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, 733–34 (1986). "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." *State v. Thomas,* 109 Wn.2d 222, 225, 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney's performance fell below an acceptable standard, but also that his attorney's failure affected the outcome of the trial.

Under the *Strickland* standard "the defendant must show that counsel's performance was deficient." *Strickland* at 687. Trial counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "Judicial scrutiny of counsel's performance must be highly deferential" because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. The presumption is that

counsel was effective, and "the defendant must overcome the presumption…." *Id.*

"Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. For prejudice to be proved a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met, than a defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

Stipulations are frequently tactical choices.

A "stipulation to evidentiary facts does not necessarily demonstrate incompetency of counsel." *U.S. v. Ferreira-Alameda*, 804 F.2d 543, 545 (9th Cir. 1986), *amended*, 815 F.2d 1251 (9th Cir. 1986) (citing *U.S. v. Gray*, 626 F.2d 102, 106 (9th Cir.1980).) A defense counsel's "strategic decision to stipulate falls well within the range of reasonable professional assistance." *Lang v. Callahan*, 788 F.2d 1416, 1418 (9th Cir. 1986) (citing *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir.1985).)

A stipulation may be a reasonable strategic decision when defense counsel seeks to "prevent the further presentation of harmful evidence..." *U.S. v. Davis*, 36 F.3d 1424, 1433 (9th Cir. 1994). Stipulations to probation violations, where the violation is "obvious" have been found not to constitute ineffective assistance. *See Grady v. U.S.*, 929 F.2d 468, 471 (9th Cir. 1991).

In the instant case, as stated by defense counsel, the testimony at trial established that Defendant was working as a house painter. Defense counsel could have calculated that the judge might think Defendant's job skills would make him less likely to reoffend, or that fighting over this minor point would antagonize the court.

The mere fact that Defendant's trial counsel stipulated to something fails to meet the first prong of *Strickland* because attorneys frequently stipulate to things that are not really disputed. Because Defendant fails to establish the first prong of the *Strickland* test he fails to establish ineffective assistance.

Defendant cannot show prejudice.

Defendant claims that he is prejudiced by his counsel's stipulation because, if he had not made the stipulation, the court "would have been

compelled to refrain from imposing discretionary costs." Brief of Appellant at 16. This is untrue.

As noted by trial counsel, there was testimony at the trial that Defendant was working when the police contacted him. Trial counsel did nothing more than stipulate to what was undisputed. There was no prejudice because the court heard that the undisputed evidence and probably would have come to the same conclusion without trial counsel's stipulation.

Defendant can petition the court to reconsider imposition of costs at any time, so there is no prejudice.

Further, a defendant ordered to pay costs "can petition the court if he is unable to meet his obligations in the future." *State v. Woodward*, 116 Wn. App. 697, 706, 67 P.3d 530, 535 (2003) (citing *State v. Bower*, 64 Wash.App. 808, 814, 827 P.2d 308 (1992).) "If he can establish to the trial court's satisfaction that he is so utterly destitute and lacking in prospects as to make even minimal payments a hardship, the trial court could exercise its discretion to modify his obligations in light of his changed financial circumstances." *Id.* (citing RCW 9.94A.753(2) & RCW 9.94A.760(7).)

Because Defendant can petition the court if he finds himself unable to pay in the future, there is no prejudice from a stipulation at the time of imposition.

"Indigent" at the time of the filing of a charge does not mean a defendant cannot pay obligations in the future.

Defendant's argument depends on a false equivalency; that an inability to pay for an attorney at the time a criminal charge is filed necessarily means that Defendant will not have the ability to pay in the future.

"Indigent," for the purposes of determining a criminal defendant's ability to pay is defined in relevant part as, "Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel." RCW 10.101.010(3)(d). The court made this determination at the time of the filing of the charge. See CP at 3-4. Necessarily, this determination is not prospective, but "the inquiry at sentencing as to future ability to pay is somewhat speculative…" *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116, 1120 (1991), *amended*, 837 P.2d 646 (Wash. Ct. App. 1992). Simply because a defendant cannot afford a retainer does not mean that he will remain forever indigent, or should remain forever exempt from any

repayment obligation. See *Fuller v. Oregon*, 417 U.S. 40, 53, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

This court should look beyond the false equivalency of Defendant's argument. Because he could not pay thousands of dollars for a retainer does not mean he will not be able to pay fifty dollars a month. This court should reject Defendant's argument.

Claiming ineffective assistance is an attempt to argue an issue not preserved for appeal.

"A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, 682 (2015). "This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond." *Id.* (citing *State v. Davis*, 175 Wash.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013).)

As there was no objection at the trial court below, a simple challenge to the imposition of the costs would ordinarily not be considered on appeal. The framing of this issue as "ineffective assistance" appears to be an attempt to bypass the fact that this issue was not preserved for appeal. This court should uphold the imposition of costs because Defendant did not object below.

3. The issue of appellate costs is not yet ripe.

Finally, Defendant asks this court not to impose appellate costs if the State prevails and moves to impose costs.

"'Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678, 685 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wash.2d 238, 255–56, 916 P.2d 374 (1996).)

In this case the challenged action is far from final – it has not even occurred yet. This court has the discretion to impose the costs, however, as of yet, there is no request for costs. This court should defer on any such decision until, at least, the State asks for costs and the issue is ripe.

CONCLUSION

Ample evidence supports Defendant's conviction because the law is clear that a robbery still occurs when the victim is forced away from the scene of the robbery. Further, even if this were not the case, the evidence showed that Defendant also took a stun gun from the presence of the victim, and then used it to inflict harm to further the crime. It was not

ineffective assistance to stipulate that the Defendant has job skills, especially when there was no evidence to the contrary. Finally, this court has discretion in the imposition of costs, but that decision should wait for the issue to ripen. Defendant's conviction should be upheld.

DATED this _10th_ day of August, 2016.

Respectfully Submitted,

BY: __s/ Jason F. Walker____
JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

GRAYS HARBOR COUNTY PROSECUTOR

August 10, 2016 - 6:15 PM

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